Falcone Electric Corp. *and* Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, CLC. Cases 29–CA–15559 and 29–CA–15742

September 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The Board must decide whether the Respondent violated Section 8(a)(3) and (1) of the Act by denying applicants employment because of their union affiliation and whether the Respondent violated Section 8(a)(1) by coercively interrogating and threatening applicants.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Falcone Electric Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the ~~Order.~~[4]

[1] On March 17, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge, for the reasons stated by him, that *Shawnee Industries*, 140 NLRB 1451 (1963), enf. denied in part 333 F.2d 221 (10th Cir. 1964), is not applicable to this case. We reject the General Counsel's contention that *Shawnee Industries* stands for the proposition that an employer can violate Sec. 8(a)(3) by refusing to hire applicants because of their union affiliation even though the employer has no jobs available. That proposition, were it applied to the facts of this case, would not survive the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, under that analysis, we would find that the General Counsel has established a prima facie case that, inter alia, the three applicants were refused employment after the Respondent had knowledge of their union affiliation, but that the Respondent carried its burden of showing that, because no jobs were available when they applied, the Respondent would not have hired them even in the absence of their union membership.

[4] The judge inadvertently directed his recommended Order against Trinity Construction, Inc. We correct this error and properly direct our Order against the Respondent, Falcone Electric Corp.

Emily Desa, Esq. and *Joel H. Friedman, Esq.*, for the General Counsel.

Steven B. Horowitz, Esq. (Horowitz & Pollack, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were tried before me in Brooklyn, New York, on January 14, 1991. The charge in Case 29–CA–15559 was filed on March 4, 1991, and the charge in Case 29–CA–15742 was filed on May 20, 1991. The allegations of the consolidated complaint are:

1. That on February 25, 1991, the Respondent by Paul DeBenedetto, one of the Respondent's principal owners, interrogated an applicant for employment regarding his union membership.

2. That on February 25, 1991, the Respondent by Paul DeBenedetto refused to hire Michael Takvor, James Quadrino, and Joseph Pascarella because they were members of Local 3 and not members of Local 363 International Brotherhood of Carpenters and Joiners of America.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The employer, a small contractor engaged in providing electric services in the building and construction industry, has a collective-bargaining agreement with Local 363 International Brotherhood of Carpenters and Joiners of America. The contract that was in effect at the time of these events contained a union-security clause requiring membership in Local 363 after 30 days of employment. The contract did not contain any provision requiring the employer to utilize Local 363 to refer employees to it although there had been such a provision (since deleted), in a previous agreement.

For some years the Charging Party, Local 3, has been engaged in a campaign to organize employees of various electrical contractors who have collective-bargaining agreements with Local 363. In 1991, Local 3 as part of its campaign, created something called the ''Salting Program.'' The aim of this program, which was run by its business representative Vincent McElroen, was to send out unemployed Local 3 members to shops having contracts with Local 363 and attempt to get them hired. In this effort, Local 3 members were instructed as to which Local 363 shops to seek employment and were told to inform whomever interviewed them that they were members of Local 3. They were also instructed to immediately report back to Local 3 if they were not hired and to make a verbal report to McElroen or his secretary. Such reports were then reduced to writing either by McElroen or his secretary.

It seems obvious to me that the goal of this program was twofold. (1) To get Local 3 members employed in Local 363

shops if possible and (2) to gather evidence to make out unfair labor practice charges against any employer who indicated by word or deed its refusal to hire Local 3 members because of their affiliation with that Union. In my opinion this was an imaginative tactic and was a legitimate means by which Local 3 waged its campaign against Local 363. The issue before me is whether the evidence obtained by these means was, in this case, reliable and whether it establishes the violation alleged by the General Counsel.

The General Counsel presented three witnesses, Michael Takvor, James Quadrino, and Joseph Pascarella, each of whom was sent separately by Local 3 to the Respondent on the same day (Feb. 25, 1991), with instructions to ask for employment. At this time, each was unemployed, having been laid off from a Local 3 employer, and was available for work.

Joseph Pascarella testified that when he arrived at the shop, he spoke to Paul DeBenedetto, asked for employment, and volunteered that he was a member of Local 3. He states that DeBenedetto said that Falcone Electric was a Local 363 shop and that if Pascarella became a member of Local 363 he could be given a job. According to Pascarella, he said that he already was a member of Local 3, whereupon DeBenedetto said that he could not help him. Pascarella states that he wrote down and left his name, address, and phone number before leaving the office. He states that subsequently in June 1991 he called DeBenedetto by phone, asked if his name was still on file, and was told by DeBenedetto that he had no record of him. According to Pascarella, he asked if DeBenedetto held it against him that he was a member of Local 3 and DeBenedetto said ''no.''

In connection with Pascarella's testimony, I received into evidence a statement referring to his interview at the Respondent that was in Local 3's files and was produced pursuant to a subpoena served on it by the Respondent. In view of the testimony that Local 3's members were instructed to report the results of their job interviews and since this document, even though not written by, signed by, nor reviewed by Pascarella, was contained in Local 3's files, I received it into evidence pursuant to Rule 803(6) as a record kept in the ordinary course of business. This ''statement'' which is dated February 25, 1991, and was probably written out by McElroen's secretary states:

> Only 3 guys working—not hiring—if he was hiring he had to clear it with 363—he only hires 363 men—where are you from Local 3, yes—he only hire 363 men—if you want go to 363. Left name & telephone—

James Quadrino testified that he too went to Falcone Electric on February 25 and spoke to Paul DeBenedetto. He states that he said that he was a member of Local 3 whereupon DeBenedetto said that this was a Local 363 shop; that Quadrino had to go down to Local 363; and that Local 363 had to hire him before he could be hired by the Respondent. Quadrino states that he then suggested without success, that if he was hired now he could become a member of Local 363 later.

Michael Takvor testified that after he asked for a job, DeBenedetto asked him to describe his work experience. Takvor related that he had about 9 years' experience whereupon he was asked if he was a member of Local 3 to which he said ''yes.'' According to Takvor, DeBenedetto said that he got his men from Local 363 and only hired off the street if Local 363 couldn't refer anyone. Takvor testified that DeBenedetto told him that he was not hiring at that time but asked him (Takvor), to write down his name, address, and telephone number.

Paul DeBenedetto testified that he recalled that only two persons came to his shop on February 25 just before he was closing. He states that both asked for jobs and that he told them that he was not hiring. He denies that he spoke about any unions, that he asked them about their union affiliations, or that he told them that he only hired men referred from Local 363.

The Respondent produced its payroll records which showed that *no one* was hired at or around February 25, 1991. At that time the Respondent employed three employees other than DeBenedetto and Falcone (the two partners), and had on February 4, 1991, laid off one worker because work was slow. The next person hired by the Company was Angel Santana, who was hired as an apprentice on April 29, 1991. On May 29, 1991, another of its employees was fired. On June 3, 1991, a second apprentice was hired and on July 18, 1991, a journeyman mechanic and an apprentice were laid off for lack of work. In short, the evidence shows that at the time the three individuals sought employment the Respondent was not looking to hire anyone.

As it is clear to me that the three individuals were refused employment because there was no work available for them and not because they were members of Local 3, I shall recommend that the 8(a)(3) allegations be dismissed.

I do not think that the General Counsel's reliance on *Shawnee Industries*, 140 NLRB 1451 (1963), enf. denied 333 F.2d 221 (10th Cir. 1964), is applicable. The employer there was hiring people to man a new facility and rejected five persons because of their union membership. Two of the rejected persons were qualified for jobs for which there were no openings. In finding an unlawful refusal to hire, the Board concluded that a reason for their rejection was due to their union membership and not simply because no suitable jobs were available to them. The Board found a violation of Section 8(a)(3) but ordered that the Respondent offer jobs to the two applicants when jobs to which they were qualified were available at a subsequent time. Unlike the present case where Falcone Electric was not considering anyone for employment, the employer in *Shawnee* was actively interviewing job applicants, hired some people and refused to hire others based in part, on discriminatory grounds. Here the evidence convinces me that notwithstanding the applicant's union affiliation, the Respondent would not have hired them in any event, because it was not considering anyone for employment at the time in question. Thus, unlike *Shawnee*, I conclude that there is insufficient showing of discriminatory intent in the present case.

I shall also recommend that the interrogation allegation be dismissed as I do not think that it amounts to a coercive action in the circumstances of this case. As Local 3 is the dominant labor union in the New York City electrical industry, it seems to me that it would be normal and not coercive for an employer seeking to discover an applicant's work experience to inquire if he had worked for Local 3 shops and was a member of that union. Moreover, the evidence presented by the General Counsel shows that two of the three employees,

by their own assertion, volunteered that they were members of Local 3 as they were instructed to do under the Salting Program.

On the record as a whole I do tend to credit the General Counsel's witnesses to the extent that they testified that they were told by DeBenedetto, in substance, that he had a contract with Local 363 and that he hired persons referred by that Union. In this respect, these witnesses may have reasonably construed DeBenedetto's remarks as implying that he could not hire people who were members of Local 3. Accordingly, to this limited extent, I think that the Employer, violated Section 8(a)(1) of the Act.[1]

CONCLUSIONS OF LAW

1. By impliedly notifying job applicants that they could not be hired if they were members of Local 3, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent has not violated the Act in any other manner encompassed by the consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Trinity Construction, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening not to hire job applicants because they are members of Local 3, International Brotherhood of Electrical Workers, AFL–CIO, CLC.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] I note, however, that in *Kaiser Gypsum Co.*, 118 NLRB 1576, 1580 (1957), the Board stated:

> We have held that the policy of hiring through a union is not necessarily violative of the Act. The mere fact that the employer utilizes the employment facilities of the union on a non-exclusive basis because these facilities best suit his need for obtaining experienced personnel, does not prove that the parties were operating on a closed-shop basis or were engaging in prohibited conduct.

[2] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT notify applicants for employment that we will not hire them because they are members of Local 3, International Brotherhood of Electrical Workers, AFL–CIO, CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FALCONE ELECTRIC CORP.